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IN THE

# Supreme Court of the United States

October Term, 1939

No. 593

FRANCES PERKINS, Individually and as Secretary of Labor of the United States, et, al., *Petitioners*,

*v.*

LUKENS STEEL COMPANY, a corporation, et al., *Respondents*.

## RESPONDENTS' BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

WILLIAM CLARKE MASON,
O. MAX GARDNER,
FREDERICK H. KNIGHT,
HAROLD F. McGUIRE,
ROBERTS B. THOMAS,
*Counsel for Respondents.*

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## RESPONDENTS' BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

### Opinions Below

The opinions of the United States Court of Appeals for the District of Columbia, the court below (R. 387-410), are reported in 107 Fed. (2d) 627.

### Jurisdiction

The jurisdiction of this Court has been invoked under section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

### The Question Presented

The question presented is whether this Court should exercise its discretion to review a judgment (R. 410) of the

United States Court of Appeals for the District of Columbia, holding (R. 388, 405) that the complaint (R. 2-45), as amended (R. 313-318), of respondents, seven of the smaller eastern steel companies (R. 9), sets forth facts sufficient to constitute a claim[1] for injunctive relief in respect of (R. 42-44), and a declaratory judgment as to the invalidity of (R. 44), a determination (R. 239-254,—hereinafter called the Determination), by petitioner McLaughlin, as Acting Secretary of Labor,[2] which he purported to make pursuant to the Public Contracts (Walsh-Healey) Act,[3] and in which he purported to "establish" (R. 254) the minimum wages which members of the iron and steel industry desiring to bid on and enter into Government contracts must agree to pay to employees engaged in the performance thereof.

The court below held (R. 388-405) that the Determination was "not only unwarranted" by the Act "but incongruous" (R. 390) because so far beyond the jurisdiction and authority of the Secretary of Labor thereunder as to be "a palpable evasion of the letter and spirit of the pertinent statute" (R. 396-397) and "an attempt arbitrarily to disregard the statutory mandate" (R. 390).

The basis of such decision was that, whereas the authority of the Secretary of Labor under the Walsh-Healey Act is limited to the *ascertainment* of the prevailing minimum wage (for a particular industry, or for groups of industries, or for similar work, etc.) in each *"locality"* (i.e. local center of manufacture or community) in which

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[1] The District Court had dismissed the complaint, as amended (R. 319-320).

[2] The Determination was made with the authorization, approval, consent and active participation of petitioner Perkins, Secretary of Labor (R. 24).

[3] Act of Congress approved June 30, 1936, Public No. 846-74th Cong.; 49 Stat. 2036-39, c. 881. Appendix (A-1), pp. 3-9.

specified government supply contracts are to be performed, the Acting Secretary in the Determination had attempted, *inter alia*, to *fix* a single minimum wage for the iron and steel industry in a vast *region* consisting of 13 states, part of a fourteenth, and the District of Columbia, and embracing a number of local centers of manufacture (including those in which respondents' plants are located) with lower prevailing minima, by the simple device of calling that vast region a "locality."

## Reasons Why the Writ Should Not Be Granted

1. Petitioners have already had two days in court before an appellate tribunal, the court below. The first was before the full Court of Appeals of five members, on respondents' application for a preliminary injunction (R. 337-352), which was granted (R. 372) after extensive argument, oral and written (R. 371-372; 381; 355-356; 373-378), in which petitioners insisted that an "extraordinary showing" (R. 363) of "probable success on appeal" (R. 359) was required. The second was on the appeal proper, heard by three members of that court (R. 385). The ultimate issues in the case were thus before the court below on two occasions.[4] That they received the most careful consideration is shown by the scholarly and comprehensive opinion of Mr. Justice Miller (R. 388-405).

2. In view of the Court of Appeals' characterization of the Determination as a "palpable evasion" of the law "in the teeth of the statute" (R. 396-397) and the strong implication that it was deliberately disingenuous as well (R. 394; see pp. 11-12, *infra*), we feel justified in asserting that

[4] In each instance, Mr. Justice Edgerton was the sole dissenter (R. 372, 388). His dissent on the appeal was based primarily on procedural grounds (R. 406-410).

the administrative action in question is of the very type which tends to impede the development of administrative law by supplying the particular instance of glaring wrongdoing which casts doubt on the general process. Such action should not be encouraged, even temporarily, by further court review or accorded the opportunity thereby to protract litigation, on which it thrives by wearing down the citizen who seeks to protect his rights. These respondents have already been put to great trouble and expense in defending against this unjustified Determination, which threatened illegally to deprive them of their lawful right to bid and negotiate for Government contracts subject only to limitations imposed or authorized by Congress and to destroy their long existing business relations with the Government (R. 4-5, 37-38, 313).

3. Neither respondents nor the decision below have in any way obstructed the Government's contracting or purchasing activities, as suggested in the petition for certiorari (pp. 9, 13-14). On the contrary, the sole purpose of respondents' suit and the sole effect of the decision below were to remove an unlawful restriction on Government contracting, i.e., to prevent the imposition, through arbitrary action of a non-contracting officer, of a new and unlawful condition upon bidding for Government contracts, which condition was unrelated to the purposes of any contract and threatened to create a monopoly among the large, fully integrated and geographically well-placed steel plants, situated at Pittsburgh, Youngstown, Gary and Birmingham, whose wage rates were not affected by the Determination (R. 37-38; 171-173; 162). It is a matter of public record that Government purchasing machinery has not only functioned normally,[5] but has, indeed, functioned

[5] Captain C. W. Fisher, Construction Corps, United States

at an accelerated rate,[6] since the issuance by the court below of an injunction against the continued enforcement of the Determination.

4. There is no conflict between the decision of the court below and that of any Circuit Court of Appeals, and it is most unlikely that there ever could be any such conflict, since it would seem impossible for any court not sitting in the District of Columbia to obtain jurisdiction over a suit of this character.

5. The decision of the court below, in so far as it involves the provisions of the Walsh-Healey Act, is in obvious conformity with both the language of the Act and the clearly expressed Congressional intent. The rulings of the court below on procedural issues follow long lines of

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Navy, testifying on May 13, 1939, with respect to S. 1032, 76th Cong., 1st. Ses., stated: "The minimum-wage determination in the iron and steel industry practically eliminated competition in the industry while it was in effect. The bidding on steel, while the minimum-wage determination was in effect, was confined to two bidders agreeing to the stipulations, and as only one of these could produce steel within the whole range required, the bidding was limited on some items to one bid. Bidding is now normal due to the temporary court injunction suspending this wage determination." Hearing on S. 1032, 76th Cong., 1st. Ses., p. 40.

[6] Bulletins Nos. 126 to 166 of the Division of Public Contracts of the Department of Labor show that during the 41 week period from March 27, 1939, the date of issuance of such injunction, to January 6, 1940, contracts subject to the Walsh-Healey Act for more than $56,000,000 have been awarded for iron and steel products. During the comparable periods June 10, 1938—March 26, 1939, and April 1, 1938—January 14, 1939, the amounts of such contracts for such products were approximately $25,000,000 and $28,500,000, respectively (Bulletins Nos. 85 to 125; 75 to 115).

decisions by this Court in analogous cases and the principles established therein.

**The Specific Issues Raised By the Petition for Certiorari**

The specific substantive issue raised by the petition is:

Was the Determination beyond the jurisdiction or authority of the Secretary of Labor under the Walsh-Healey Act?

The specific procedural questions thus raised are:

(a) Do the respondents have a standing to sue?

(b) Is the administrative action complained of subject to judicial review?

(c) Is the suit one against the United States?

**The Statute Involved**

The Public Contracts (Walsh-Healey) Act is printed at pp. 3-9 of the Appendix (A-1) filed herewith. In so far as here material, the Act provides, in substance, as follows:

Section 1 (b) provides that in any Government contract for the manufacture or furnishing of supplies in an amount exceeding $10,000, there shall be included a stipulation that all persons employed by the contractor in performing the contract will be paid "not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed"

(a) "on similar work" "or"

(b) "in the particular or similar"

(i) "industries or"

(ii) "groups of industries"

"currently operating"

"in the *locality* in which the * * * supplies * * * are to be manufactured or furnished under said contract * * *."

Section 11 provides that Section 1(b) shall apply only to contracts relating to such industries as have been the subject matter of a determination by the Secretary.

Sections 2 and 3 provide for "liquidated damages" in the amount of any underpayment of wages resulting from breach of a minimum wage stipulation (§ 2); contract cancellation for any such breach (*ibid.*); and black-listing from award of Government contracts for three years of any person found by the Secretary to have committed any such breach (§ 3).

Sections 4 and 5 authorize the Secretary to administer the Act, to make rules and regulations necessary to carry out its provisions, and to make necessary appointments (§ 4); confer power upon the Secretary or his authorized or designated representatives to make investigations and findings as provided in the Act (§ 4) and to hold hearings and to issue orders requiring testimony and evidence under oath relating to the matter under investigation or in question (§ 5); require that the Secretary or such a representative "shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States" (§ 5); and authorize the Secretary or such representative to make such "decisions", based upon findings of fact, as are deemed to be necessary to enforce the provisions of the Act (§ 5).

A copy of the regulations under the Act (No. 504), as in effect at the time of the institution of suit by respondents and at all other times material to this litigation,[7] is set forth in the Appendix (A-2, pp. 11-19) filed herewith.

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[7] Such regulations were amended as of April, 1939, but in no respect having any bearing on the questions here presented.

## Summary Statement of Facts[1]

### 1. The Proceedings Leading Up to the Determination.

Under date of July 11, 1938, petitioner Walling, the Administrator of the Division of Public Contracts, issued notice (R. 45-46) that a hearing would be held before the Public Contracts Board, appointed by the Secretary of Labor, "to take testimony upon which findings of fact will be made to assist the Secretary * * * in determining * * * the prevailing minimum wages in the Iron and Steel Industry". On July 25 and 26, said Board held a "hearing", at which it received unsworn "evidence" and at which respondents were represented (R. 15-16).

On the basis of such "hearing" the Board made Findings of Facts, Conclusions, and Recommendations, dated October 27, 1938, hereinafter called the Report (R. 17). A copy of the Report (R. 47-218) is annexed as an exhibit to the complaint. It consisted of a majority report (R. 47-207) containing the facts found by all members of the Board (R. 207) and the conclusions and recommendations of two of its three members, and a minority opinion (R. 207-218) by the third member stating his conclusions and recommendations.

In the Report, the Board made findings as to the mini-

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[1] This Statement is necessary for the reason that the petition does not contain an adequate statement of the material facts. The petition does not even contain a summary description of any of the so-called "localities" in which the Determination established minimum wages, although the primary issue in the case concerns the authority of the Acting Secretary of Labor to establish minimum wages in areas of such vast extent. Respondents feel justified in suggesting that the failure of the petition to discuss the facts of the case is highly significant.

mum wages (common labor base rates[9]) paid in 234 of the country's 461 iron and steel plants, and the respective locations of such plants (R. 62-74; 77-113). But proceeding on the assumption that the Public Contracts Act did not limit the jurisdiction of the Secretary of Labor to the determination of prevailing minimum wages in "localities", but on the contrary authorized the Secretary to determine prevailing minimum wages in respect of a particular industry "either as a whole or over broad geographical regions" (R. 160),—an interpretation of the Act theretofore followed by the Department of Labor and its Secretary,[10]—the Board *frankly* made no effort to ascertain the minimum

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[9] This rate is paid to about 8.6% of the workers in the industry (R. 58). It is "substantially a rock-bottom rate" (R. 60) on which wages paid to all other workers are based (R. 60-61). Consequently, all other hourly wages paid will vary with this basic common labor rate (*ibid.*).

[10] See O. R. Strackbein (Member, Public Contracts Board, U. S. Department of Labor) "The Prevailing Minimum Wage Standard" (1939), pp. 30-31: "The Department of Labor interpreted this language [i.e. Sec. 1 (b) of the Act] as providing four alternatives. The standard, thus interpreted, was held to be the prevailing minimum wages for persons employed (1) on similar work; (2) in the particular industry; (3) in similar industries; or (4) in groups of industries currently operating in the locality.

"Under this interpretation, the restrictive clause 'currently operating in the locality' modifies only the fourth alternative, i.e., groups of industries; and the Secretary of Labor is free to disregard the stricture when any one of the other three alternatives is utilized, i.e., similar work; the particular industry, or similar industries."

To the same effect, see *In the Matter of Determination of Prevailing Minimum Wages in the Men's Work Clothing Industry*, 2 Fed. Reg. 233.

wages for iron and steel workers prevailing in the various localities from which the Government might be supplied with iron and steel. It did, however, frequently recognize that different minimum wages prevailed in numerous "producing centers" and "localities" (see, e.g., R. 176-179, 190-192).

The majority recommended (R. 206-207) that the Secretary determine a prevailing minimum wage of 45c. an hour "within the area made up of" the 12 Southern States, running from Virginia to Texas and Oklahoma, and 62½c. an hour "within the area made up of" the remaining 36 States. The minority differed from the majority in recommending that such 36 states should be divided into four sections and that specified prevailing minimum wages be determined in each (R. 216-218), including "the eastern section" (R. 216),—the "region lying east of what is generally known as the Pittsburgh district" (R. 209),—in which a minimum wage of 56½c. per hour was said to prevail (R. 209-216).

## 2. The Determination.

The matter subsequently came on for oral argument before the Acting Secretary,[11] who handed down the Determination (also annexed to the complaint—R. 239-254) under date of January 16, 1939.

In the argument before the Acting Secretary there was no dispute (and there is none now) regarding the Board's "finding[s] as to the wages actually being paid in the

[11] Respondents had theretofore filed a petition to reopen the hearing before the Board (R. 20-21; 218-230). Such petition having been denied (R. 21), they filed exceptions to the Report (R. 21; 231-239) and a brief in support thereof (R. 22) and participated in such oral argument (R. 22).

industry" (R. 241), which were accordingly adopted by the Acting Secretary (*ibid.*, R. 314), but only as to the "conclusions" and "recommendation[s] based on these wage facts" (R. 241). All objections thereto turned "upon the construction to be placed upon the language of Section 1 (b) of the Public Contracts Act" (R. 242),—a question of law the decision of which underlay the entire Determination.

Apparently conceiving that it was hopeless further to deny that the authority of the Secretary of Labor under the Act is limited to the determination of prevailing minimum wages in "localities",—as is now conceded by petitioners,—the Acting Secretary in the Determination rendered lip service to the statute by purporting to construe the term "locality", as employed in Section 1(b) (R. 242-246), and then to select geographical "areas" (R. 247-250) comprehended within his unique definition of "locality" and to determine prevailing minimum wages therein.

The Acting Secretary "construed" the term "locality" to mean any area, however large, which the Secretary of Labor may select, in the light of "economic facts" pertaining to the particular industry, for the purpose of determining prevailing minimum wages (R. 26, 244-247).[12] This "construction" was disingenuously stated (R. 245) to be the "consistent administrative construction" of the Act. This myth having been exploded by the decision of the court below (R. 393-394), it is now explained (Petition, p. 17, Note 5) that what the Acting Secretary meant was that the result obtained by such "construction" was "wholly consistent" with the "results" obtained by the

[12] The definition of "locality" suggested in the petition for certiorari (p. 15) is "an area of small or large extent according to the economic facts of the particular industry."

earlier "construction", which had entirely *read out* of the Act the requirement that the Secretary determine prevailing minimum wages in particular industries by "localities", and had led to determinations of such wages for the nation as a whole[13] or over broad geographical regions.[14]

The "consistent result" obtained in this case was as follows:

The Determination divided the entire United States into six areas, designated as "localities" (R. 253-254). It stated that "in the *locality* consisting of Ohio, Pennsylvania, Delaware, Maryland, Kentucky, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, and Maine, and that portion of the State of West Virginia comprised within the counties of Hancock, Brooke, Ohio, Marshall, Harrison,[15] and Monongalia, and the District of Columbia," the prevailing minimum wage was determined to be, and was "established" at, 62½c. per hour (R. 254). This area, consisting of 13 states, part of a fourteenth[15] and the District of Columbia, is hereinafter sometimes called the Thirteen State Area. The

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[13] See e.g. the minimum wage determinations for the Men's Work Clothing Industry, 2 Fed. Reg. 233; the Cotton Garment and Allied Industries, 2 Fed. Reg. 1333; and the Work Glove Industry, 2 Fed. Reg. 1339.

[14] See e.g. the minimum wage determinations for the Men's Underwear Industry, 2 Fed. Reg. 1337; and the Luggage and Saddlery Industries, Fed. Reg. (Daily) July 15, 1938, p. 1733.

[15] Not the least startling "result" of the Acting Secretary's "flexible" and "reasonably broad interpretation" (Pet., pp. 16, 17) of "locality" was that the county of Harrison, West Virginia, although *entirely surrounded* by the southern "locality" designated by him, was nevertheless "determined" to be a part of the "northern locality" in which respondents' plants are situated! (See Appendix B.)

eastern portion of such area had been frankly characterized in the Report as a "region" (R. 209).

In the other five so-called "localities" selected in the Determination, viz.:

(1) The "southern area", consisting of 12 states and 49 counties of West Virginia (R. 247), which area, prior to the addition of the West Virginia counties, had been viewed by the Board as a "region" covering "a very large territory" (R. 159),

(2) The 3 west "coastal states" (R. 248),

(3) The 8 "mountain states" (R. 248),

(4) The 7 "remaining states east of the mountain states and west of the Mississippi," and the area about East St. Louis, Illinois (R. 248, 253), and,

(5) The 4 states in the "area immediately to the east of the trans-Mississippi locality", (R. 249),

the hourly prevailing minimum wages were determined to be, and were "established" at, 45c., 60c., 60c., 58½c. and 62½c., respectively (R. 253-254).

Thus the upshot of the Determination was that four minimum-wage areas were fixed, the 62½c. area running from the Atlantic Ocean to the Mississippi and from Maine to Kentucky.

For the convenience of the Court there are set forth in Appendixes B, C and D, respectively, filed herewith:

(a) A map of the United States showing the six areas designated as "localities" in the Determination, and the prevailing minimum wages "established" in each (Appendix B);

(b) A copy of a map contained in the February, 1939, issue of the Labor Information Bulletin, published by the Department of Labor, which shows the

areas in which the four wage rates established by the Determination were "set" (Appendix C); and

(c) A map of the United States depicting (i) the approximate location of the plants in the iron and steel industry concerning which wage data are set forth (R. 63-74) in the Report of the Board; (ii) the common labor base rate paid by each such plant, and (iii) a classification of such plants by the number of wage earners employed thereat (Appendix D).

The Determination was to have become effective by its terms, as modified by a subsequent order of the Acting Secretary (R. 254) amending in this respect his previous "decision",[16] on March 1, 1939.

### 3. The Purpose and Effect of the Determination.

The purpose and effect of the Determination were to *fix* minimum wages *never theretofore prevailing* in various localities producing iron and steel products. Such was clearly the case in respect of the localities in which respondents' plants are located, and, space permitting, the same could be shown for many other localities (see e.g. R. 137, 138, 140, 148, 151, 165, 176, 178-180).

Respondents operate iron and steel plants in Coatesville,[17] Ivy Rock, Conshohocken, Swedeland,[18] Chester[19]

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[16] Compare Section 5 of the Act.

[17] Approximately 40 miles from Philadelphia and 310 miles from Pittsburgh.

[18] Ivy Rock, Conshohocken and Swedeland are located approximately 15 miles from Philadelphia and 340 miles from Pittsburgh.

[19] Chester is located approximately 15 miles southwest of Philadelphia and 330 miles from Pittsburgh.

and Harrisburg,[20] Pennsylvania; Colgate, Maryland[21]; and Branford, Connecticut[22] (R. 3-8),—all within the Thirteen State Area. The minimum wages (common labor base rates) paid by them vary, depending on the particular respondent and the particular locality in which its plant is situated, from 56½c. per hour to 52½c. per hour (R. 3-8, 313). In four instances such minimum wages (of 53c. and 56½c. per hour) are paid pursuant to collective bargaining agreements with national labor unions (R. 4-6, 8).

It is undisputed that the 62½c. minimum wage established for the Thirteen State Area is not the prevailing minimum wage for iron and steel workers in, or in the vicinity of, any city, county, or other State civil subdivision in which any of respondents' plants is located, or in any small geographical area surrounding any such plant, city, county, or other civil subdivision (R. 314, 255, 63-77; see Appendix D).

The Acting Secretary sought to fix such wage in such localities by the simple device of:

(a) including them in a larger region also embracing Pittsburgh, Youngstown, and other localities to the west enjoying various geographical advantages, in which the prevailing minimum wages for iron and steel workers have for many years been higher than those in the localities in which respondents' plants are situated, and

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[20] Harrisburg is located approximately 100 miles from Philadelphia and 250 miles from Pittsburgh.

[21] Colgate, Maryland, is located approximately 340 miles from Pittsburgh.

[22] Branford, Connecticut, is located approximately 520 miles from Pittsburgh.

(b) labelling such large region a "locality" (R. 29-30, 37-38, 314-316).

But the purpose and effect of the Determination were more sweeping. A glance at Appendix D will reveal that by the same process the Acting Secretary sought to fix a minimum wage never theretofore prevailing in one of the great industrial and geographical regions of the nation.

Thus, although a minimum wage rate lower than 62½c. per hour is paid by all but three plants (operated by one company and employing 115 common laborers) out of a total of 58 plants (employing 5,389 common laborers) located in what is known in the industry as the "Eastern District",[23]—being the entire area of the United States east of Altoona, Pennsylvania, and north of Virginia, plus that portion of Maryland west of the Altoona line and certain counties of West Virginia (R. 255; see Appendix D)[24],—the Acting Secretary nevertheless established a

[23] This was a code district for minimum wage *fixing* purposes under the N. I. R. A. Code of Fair Competition for the Iron and Steel Industry (R. 190).

[24] The common labor base rate wage statistics for the plants in the Eastern District, as found by the Board (R. 63-74; See also R. 255) may be summarized as follows:

| | *No. of Plants* | *No. of Wage Earners* | *No. of Common Laborers* |
|---|---|---|---|
| EASTERN DISTRICT-BASE RATES, COMMON LABOR | | | |
| Under 56½¢ | 30 | 7,660 | 1,203 |
| Exactly 56½¢ | 18 | 38,069 | 3,854 |
| Exactly 57¢ | 5 | 4,005 | 194 |
| Over 57¢ but under 62½¢ | 2 | 5,195 | 23 |
| Exactly 62½¢ | 3 | 3,602 | 115 |
| Over 62½¢ | — | — | — |
| | 58 | 58,531 | 5,389 |

62½c. minimum wage therein. And he did so, notwithstanding the fact that the Bureau of Labor Statistics of his own Department had for many years recognized[25] that such "Eastern District" was an area between which and the so-called "Pittsburgh district" to the west[26] (grouped with it in the Determination) there had long existed a geographic wage differential in the iron and steel industry.[27]

This "consistent result" was sought to be justified solely on the ground that it "would seem" that a single eastern market area was predominantly served by the iron and steel plants in the Thirteen State Area (R. 250, 315),—a justification which would convert the Act into one authorizing the fixing of equal wages for persons employed

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[25] See, among other publications of the Bureau, Bulletin No. 151, May, 1914; Bulletin No. 353, April, 1924; Bulletin No. 567, December, 1932; Serial No. R. 380; Serial No. R. 415; Serial No. R. 430; and Serial No. R. 446.

[26] The most recent description of such districts is contained in Serial No. R. 380 (reprint from Monthly Labor Review for April, 1936), p. 3.

[27] The following compilation of the average hourly earnings (in cents per hour) of common labor in specified departments of the iron and steel industry is taken from United States Bureau of Labor Statistics Bulletins (No. 513, Table 4, No. 567, Table 6, and No. 403, Table 3):

| *Year* | *Eastern* | *Pittsburgh* | *Year* | *Eastern* | *Pittsburgh* |
|---|---|---|---|---|---|
| 1907 | 13.4 | 15.4 | 1919 | 39.8 | 48.0 |
| 1908 | 12.0 | 15.6 | 1920 | 45.1 | 53.0 |
| 1909 | 12.3 | 15.2 | 1922 | 32.2 | 36.0 |
| 1910 | 14.2 | 16.4 | 1924 | 38.6 | 45.1 |
| 1911 | 14.1 | 16.6 | 1926 | 37.4 | 45.2 |
| 1912 | 14.4 | 16.7 | 1929 | 37.5 | 45.3 |
| 1913 | 15.7 | 19.0 | 1931 | 35.1 | 45.9 |
| 1914 | 15.6 | 19.0 | 1933 | 29.1 | 35.8 |
| 1915 | 15.5 | 19.0 | 1935 | 41.4 | 46.6 |
| 1917 | 27.8 | 30.1 | | | |

by manufacturers (wherever located) who market their products in the same area (R. 315).

No findings of "economic facts" were made with respect to, nor was consideration given to, proximity to source of supply, freight rate differentials, caliber of labor, living costs, or any of the other factors affecting wage rates, cost of production or ability to continue to market after the Determination, of the various plants in the various communities (or, indeed, regions[28]) in the great Thirteen State Area. On the contrary, the Labor Department sought no evidence on any of these points (R. 214).

The Determination was, therefore, devoid of even a plausible economic justification for the Acting Secretary's excursion beyond his lawful authority.

### 4. The Institution of Suit.

Prior to the institution of suit respondents requested a further postponement of the effective date of the Determination, but by February 25, 1939 (the date of suit), petitioners Perkins and McLaughlin had not granted the request, and were threatening to make the Determination effective on March 1, 1939 (R. 25). Together with petitioner Walling, they were threatening to require that there be

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[28] The closest approach to such a finding were the statements of the minority of the Board (R. 214-215) that the Board did not have before it any evidence that the wage rates paid by plants in the Eastern District conferred any competitive advantage in bidding on Government contracts; and that "the forcible merging of the eastern with the western section [of the Thirteen State Area] would introduce a reallocation * * * with the effect that an unearned and gratuitous advantage would be given to one area at the expense of the other."

included in every subject[29] Government iron or steel contract entered into after that date, a stipulation requiring payment of the minimum wages prescribed in the Determination (R. 32). Petitioner Perkins had also adopted regulations requiring that every invitation to bid on any such contract (and, consequently, every bid thereon) should contain a stipulation binding the bidder to comply with the Determination (Reg. 504, Arts. 1, 1101, Appendix A-2, pp. 11, 18).

Petitioner Peoples, Director of Procurement (R. 10), acting pursuant to the direction of petitioners Perkins, McLaughlin and Walling, had directed and threatened to continue to direct every agency of the United States to include such a stipulation in every such contract and the invitations to bid thereon (R. 32, 34).

The other petitioners, chief contracting officers, and their subordinates, had signified their intent to carry out all such regulations and directions (R. 35). Invitations to bid on Navy contracts already published, and on which respondents desired to bid, contained requirements for such stipulations (R. 33-34, 316).

Accordingly, respondents, who, with one exception,[30] had been selling iron and steel products to Government agencies for many years (R. 4-8, 313), filed their complaint (R. 2-45; Exhibits, R. 45-257) on February 25, 1939. Amendments to the complaint, subsequently filed by leave of court (R. 306), are set forth at R. 313-318.

The complaint sought judgment (R. 42-44) enjoining petitioners from enforcing the Determination as aforesaid, ordering petitioners Perkins, Walling and McLaughlin to set aside and withdraw the Determination, and declaring the Determination to be unauthorized by law and invalid.

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[29] That is, every contract of a value in excess of $10,000.

[30] The Atlantic Wire Company.

### 5. The Gravamen of the Complaint.

The gravamen of the complaint was that respondents' lawful right to bid and negotiate for Government contracts free of limitations or conditions other than those imposed or authorized by Congress was unlawfully invaded and interfered with and threatened with further unlawful invasion and interference by the illegal action taken and threatened by petitioners as aforesaid (R. 36).

The value and importance to respondents of that right appears from the detailed allegations of the complaint showing their long-continued, substantial and generally profitable business relations with the Government (R. 4-8).[31]

Petitioners' illegal interference with that right was of the most serious nature. Complete destruction of the business relations between respondents and their customer was threatened. The complaint shows that if respondents were required to bid on the basis of compliance with the illegal wage conditions prescribed in the Determination, which would raise respondents' wages between 10% and 19%,[32] they were in grave danger of being driven out of competition for Government contracts by large fully integrated

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[31] The Labor Department Bulletins referred to in Note 6, p. 5, *supra*, show that, of the contracts referred to therein, more than $1,600,000, aggregate amount, have been awarded to respondents since March 27, 1939.

[32] In this connection, it is to be borne in mind that, as stated in the complaint (R. 37), and as recognized in the Report (R. 60-61), an increase in the minimum wages paid by respondents to common laborers employed in the performance of Government contracts would necessitate a corresponding increase for all classes of wage earners employed therein, since rates of pay for such other wage earners are ascertained by adding various differentials to common labor base rates.

companies enjoying more favorable geographic locations[23] (in the West and South) whose wage rates were not increased by the Determination (R. 37-38; 171-173; 162).

The impact of such unlawful interference was immediate. The complaint specifically describes certain proposed contracts, covered by the Determination, and generally describes others, some to be awarded within two weeks, others within the near future, by Federal agencies (including those headed by the contracting officers who are petitioners herein), and on which respondents desired to bid, and would bid, if the Determination should not become effective, at prices deemed high enough to enable them to realize profits (R. 33-34, 316-317).

To protect against such illegal invasion of their rights respondents resorted to the only remedy which was plain, adequate or complete (R. 37; opinion below, R. 403-404).

### 6. The Decisions of the Courts Below.

The judgment of the District Court (R. 319-320), rendered without opinion March 14, 1939, dismissed the complaint, dissolved a temporary restraining order theretofore issued, and refused to rule on and grant respondents' motion for preliminary injunction (R. 259-262).

On March 17, 1939, respondents lodged their record on appeal and, pending printing, filed in the Court of Appeals an original petition for injunction pending appeal (R. 337-355). After argument on March 22, 1939, before its entire membership (R. 371-372), that court on March 27, 1939, issued its order (R. 372) enjoining the petitioners herein, "until the further order of the Court, from continuing in effect the Determination".

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[23] From the standpoint of proximity to raw materials, proximity to markets and freight rate differentials (R. 38).

The appeal proper[34] was argued on April 4, 1939, before Justices Miller, Vinson and Edgerton (R. 385-386). On August 4, 1939, in a *per curiam* order and opinion in the appellate proceeding (R. 387-388), the court continued in effect the injunction previously granted,[35] announced the decision of its majority that the complaint stated a cause of action for an injunction as prayed, and stated that, upon filing of majority and minority opinions, the appropriate judgment would be entered.

On October 3, 1939, the opinions (R. 388-410) were filed, and judgment (R. 410) was entered reversing the judgment of the District Court and remanding the case with instructions to proceed in accordance with the opinion of the Court of Appeals.

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[34] Together with petitioners' motion to reargue the granting of the preliminary injunction or to clarify the injunction granted (R. 373-378).

[35] Such injunction is still in effect, and the order continuing it, of course, disposed of petitioners' motion referred to in Note 34. Cf. Petition, p. 8.

## ARGUMENT

### I

### The Decision Below Holding the Determination Invalid Because Beyond the Authority of the Secretary of Labor Plainly Conforms with Both the Letter and Spirit of the Statute Involved.

The authority conferred by the Act upon the Secretary of Labor is to determine "the prevailing minimum wages for persons employed[1] * * * in the *locality* in which" specified government supplies "are to be manufactured or furnished under * * * contract * * *." The Secretary has no jurisdiction to determine minimum wages prevailing on the continent of North America, or in the United States, or in "regions" or other "broad geographical areas" thereof. She must determine such wages only in "localities." Her jurisdiction is, therefore, bounded by the meaning of the word "locality."[2]

The court below has held that that term, as employed in the statute, means a "*local center* of manufacture" or "community" (R. 392, 395, 390),— on the ground that such meaning is compelled by common usage and the context and is confirmed by the legislative history of the Act and the statements of its sponsors that its purpose was to authorize the Secretary to ascertain prevailing minimum

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[1] On "similar work", or "in the particular or similar industries or groups of industries currently operating".

[2] This is a question of law for the courts. *Work* v. *Louisiana*, 269 U. S. 250, 253-254, 260; *Santa Fe Pac. R. Co.* v. *Payne*, 259 U. S. 197, 199; *Payne* v. *Central Pac. Ry. Co.*, 255 U. S. 228; *Waite* v. *Macy*, 246 U. S. 606; *Gegiow* v. *Uhl*, 239 U. S. 3; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; see *Lloyd Sabaudo Societa* v. *Elting*, 287 U. S. 329, 335.

wages in "communities", but not to fix wages (R. 395). Accordingly, the court held that the Determination, which sought to establish a single minimum wage in the Thirteen State Area, was palpably beyond the Secretary's authority.[3]

Petitioners argue (Pet., p. 15) that the court should have held that a "locality" is "an area of small or large extent according to the economic facts of the particular industry" and which may embrace at least 13 states.

(a) We believe that no extensive argument is necessary to persuade this Court that the well settled connotation of "locality" is "community", or "local center", or a similarly described small geographical area,—and not a region including at least 13 states. As pointed out by the court below (R. 393),—to the opinion of which reference is made for many of the more common expressions using the term and its derivatives,—this has been "long and well known to those acquainted with the American tradition". Indeed, petitioners do not dispute that the court below assigned to the term its commonly accepted meaning, but urge that in doing so the court did violence to the legislative intent and purpose.

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[3] The court, of course, recognized (R. 390) that within the proper limits of the meaning of "locality," the Secretary is authorized and required by the statute to exercise judgment and discretion in the selection of the particular territorial unit within which to determine minimum wages. For instance, the Secretary might select a city, a county or some similar subdivision of a State, or a metropolitan area which might even overlap a State line (R. 392)—all fairly embraced within the concept of "locality". It is obvious, however, that the Thirteen State Area does not come within such proper limits; and, indeed, petitioners concede that if the statute was correctly interpreted by the court the Determination is unlawful.

(b) The Walsh-Healey Act, adopted in recognition of the principle that, in the absence of enabling statute, the executive may not require a Government contractor to pay any specified wage to his employees,[4] is one of a series of statutes designed to carry out a general policy that the wages paid on Government work should conform to the currently prevailing wage rates or minimum wage rates for like work in the locality where the work is performed.[5]

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[4] 10 Comp. Gen. Dec. 294. This decision of the Comptroller General has been followed in practice by all the executive departments of the Government, and was expressly confirmed by the Senate Committee in charge of the original Walsh Bill (S. 3055, 74th Cong., 1st Ses.), which, after extensive amendment, became the present Public Contracts Act. In explaining the desirability of a statute authorizing the insertion of a minimum wage stipulation in contracts for Government supplies, the Senate Committee Report (No. 1157, 74th Cong., 1st Ses.) on such bill stated:

> "The committee believes that in the absence of action by Congress the Executive has power to require any condition in contracts, loans, or grants necessary to protect the United States but that his authority stops there and that matters of general policy not strictly necessary to secure to the United States the performance of a contract can only be laid down by Congress."

[5] In addition to the Walsh-Healey Act and the Bacon-Davis Act, as amended (46 Stat. 1494; 49 Stat. 1011), discussed in the text, see the Emergency Relief Appropriation Acts of 1937 (50 Stat. 352, 354, § 2) and 1938 (52 Stat. 809, 812, § 9), providing that the rates of pay for persons employed on projects thereunder should be not less than the prevailing rates of pay for work of a similar nature "in the same locality"; and § 16(2) of the Act of September 1, 1937 (50 Stat. 888, 897), creating the United States Housing Authority, and § 14 of the Act of June 3, 1939 (53 Stat. 807), amending the National Housing Act, each of which provides for the payment of the wages "prevailing in the locality" in which the work is to be performed.

The first such statute was the Bacon-Davis Act,[6] which, as amended in 1935, requires that the wages paid each class of workmen on Government construction contracts shall be based on the prevailing wages, to be determined by the Secretary of Labor, for like work "in the city, town, village, or other civil subdivision of the State in which the work is to be performed". Such territorial units were described by Representative Bacon, co-author of the statute, and by the Secretary of Labor, respectively, as "communities" and "localities".[7]

In 1936 (after first having rejected bills authorizing the fixing, by executive action, of wages to be paid on Government supply contracts[8]) the Congress enacted the Walsh-Healey Act for the purpose of extending to such contracts the principles of the Bacon-Davis Act with regard to pre-

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[6] 46 Stat. 1494; 49 Stat. 1011.

[7] For the statement by Rep. Bacon, see 74 Cong. Rec. 6511. For the description by Secretary Perkins, see "Regulations Prescribed by the Secretary of Labor as to the Procedure to be Followed in Predetermining Prevailing Rates of Wages" under the Bacon-Davis Act (U. S. Dept. Labor, No. 503, September 30, 1935), § 2.

In testifying as to her experience in administering the Bacon-Davis Act before the Judiciary Subcommittee of the House, on H. R. 11554 (the bill introduced by Rep. Healey to authorize fixing of wages on government supply contracts—see Note 8), Secretary Perkins also plainly distinguished between a "locality" (meaning thereby a town) and a "large area" (such as a State). Hearings on H. R. 11554, 74th Cong., 2nd Ses., Serial 12, Part 2, at pp. 230-231.

[8] S. 3055, 74th Cong., 1st Ses.; H. R. 11554, 74th Cong., 2nd Ses. After extensive amendment in committee which, *inter alia*, deleted the wage fixing provisions of both such bills, S. 3055 was passed by both houses as the Public Contracts Act.

vailing minimum wages. That such was the Congressional purpose, that the Congress intended not to confer directly or indirectly any wage-fixing power on the Secretary of Labor, and that Congress likewise intended to limit the Secretary's power to the ascertainment of prevailing minimum wages in "communities", appears irrefutably from the statements of the members of the Rules Committee and of the Judiciary Committee and subcommittee of the House of Representatives sponsoring and in charge of the Act, which are quoted in the opinion of the court below (R. 395, Notes 51-52).

In the light of the foregoing, it is plain that petitioners neither negative the construction of the court below, nor advance the cause of their meaningless "definition", by pointing out (Pet., p. 16) that Congress in the Walsh-Healey Act employed the more flexible[9] term "locality" instead of the language of the Bacon-Davis Act.[10] As pointed out by the court below (R. 392-393), the significance of the choice was merely to avoid confining prevailing minimum wage determinations to arbitrary political boundary lines of civil subdivisions of a State and not to permit

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[9] Throughout the petition, great emphasis is placed on the "flexibility" of the term "locality". But this begs the question. The term, though indefinite within narrow limits, unmistakably connotes restricted geographical limitations. See opinion below, R. 390-391.

[10] It is argued (Pet., p. 16) that the choice of language was dictated by the consideration that construction contracts "necessarily can be performed at only one place", whereas supply contracts may be performed at various places. That such was not the reason for such choice is shown by the fact that Congress has used the "locality" standard interchangeably for supply and construction contracts. See Note 5, p. 25, *supra*.

establishment of minimum wages for an industry throughout the nation or "over broad regional areas."

Equally untenable is petitioners' suggestion (Pet., pp. 14-15) that the construction adopted below would "wholly defeat the obvious policy of the * * * Act * * * to insure that Government contractors pay not less than prevailing minimum wages, and to eliminate substandard wages as a competitive element in bidding". This argument really begs the question by ignoring the requirments of the statute that prevailing minimum wages *in* "localities" be ascertained[11] and by assuming or implying that the function of the Secretary thereunder is to fix equal minimum wages for all who may bid on the same Government contract.

Congress, of course, sought to eliminate from competition for Government supply contracts those who would not agree to pay the prevailing minimum wages in the "localities" in which the work was to be performed, and those who reduced wages to a level below the minimum prevailing in their communities in order to obtain or carry out such contracts. But, as appears on the face of the statute and from the clearly expressed Congressional intent, the prevailing minimum wage practice *in* such "localities"

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[11] Petitioners suggestion (Pet. p. 15) that "the word 'locality' was, no doubt, inserted in order to authorize and direct the Secretary of Labor to take account of geographic differentials in wage scales", does not meet the issue. The requirement of the Act is that the Secretary determine prevailing minimum wage *in* localities, not that such wage scales or any others be "taken account of". In effect, petitioners are attempting by "interpretation" to reach the same result expressly contemplated by S. 3055, the wage-fixing measure rejected by Congress, which in terms authorized the wage-fixing authority to "take into account", *inter alia*, the standards "in the same locality".

(viz., communities) was made the test, *not* the notions of the Secretary of Labor as to what should be a proper minimum wage for those bidding on the same contract.

(c) There is no merit in petitioners' contention (Pet., pp. 14-16) that the decision of the court below would operate to reduce the Act to a "futile gesture" because on occasion but one plant of a particular industry will be found in a local center of manufacture.

This argument completely ignores the fact that the Secretary is authorized by the Act to use three criteria other than prevailing minimum wages in a particular industry in a "locality" viz., such wages paid on "similar work" or in "similar industries" or in "groups of industries". That Congress authorized the Secretary to use such other criteria for the very purpose of making wage determinations by localities feasible under the circumstances suggested was conceded by petitioners in the court below[12] and we are, therefore, surprised that they ignore this consideration here.

(d) It is further urged (Pet., pp. 14-15) that the lower court's construction of the Act would make it difficult of administration by requiring a large amount of preliminary work (regarded by the Department of Labor as useless) in advance of invitations for bids. This is strongly to be doubted,[13] but, as is pointed out by the court below, admin-

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[12] Petitioners' Brief in the court below, p. 88.

[13] Thus, in connection with the Determination, the Public Contracts Board sought wage data from every iron and steel plant in the country (R. 49), and, within a few days and without seriously extending itself, obtained such data from more than one-half such plants (R. 49-50, 77-78, 117). In this regard, it is pertinent to note that Secretary Perkins has testified that there has been "surprisingly little" difficulty in administering the Bacon-Davis Act, even though that act has

istrative inconvenience has, in any event, never been regarded as a "reason for disregarding the clearly expressed intention of Congress" (R. 393).

(e) It is also objected (Pet., pp. 16-17) that the decision of the court below contradicts the contemporaneous administrative construction under which the word "locality" means an area of small or large extent, according to the economic facts of the particular industry. But it is perfectly obvious, from a mere perusal of this so-called administrative construction, that it is no construction at all. It is a mere device resorted to for the purpose of fixing wages either in the entire United States or over "broad geographic regions" under the cloak of an utterly meaningless definition,[14]—a mantle assumed to obtain "results" "consistent" with those theretofore reached under a "construction" which had read the term "locality" out of the statute entirely (see pp. 9, 11-12, *supra*). And, as pointed out by the court below (R. 393-394) this alleged administrative construction became "contemporaneous" two and one-half years after the passage of the Act and exactly forty days prior to the commencement of suit.

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required the determination of prevailing wages for *"every classification"* of work in the hundreds of localities "scattered" throughout the nation in which public buildings and other public works have been constructed. See Hearings on H. R. 11554, 74th Cong., 2nd Sess., Serial 12, Part 2, at pp. 230-231.

[14] The Acting Secretary himself observed in the Determination (R. 246) that, when given his construction, "the language of the statute does not itself suggest answers to the questions which it raises". The serious questions of unconstitutional delegation of legislative authority which would be presented if such construction were adopted are readily apparent.

## II

### The Decision Below, Holding That Respondents Have a Standing to Sue and May Obtain Judicial Review of the Action Complained of, Was Manifestly Correct.

The primary contention of petitioners (Pet. pp. 9-12) is that, no matter how unlawful their action and threatened action, relief may not be accorded by the courts in this suit, or any other, for the reasons (1) that neither respondents, nor anyone else, has a "legally protected right" which will or could be injured by the action complained of; and (2) that such action is not subject to judicial review.[1]

The court below, in rejecting this contention (R. 397-400), followed the consistent course charted by the decisions of this and other courts.

(a) The right asserted by respondents is, as pointed out in the Statement (p. 20), the right to bid and negotiate for contracts with the United States subject only to the conditions imposed, or authorized to be imposed, by *Congress*, and free from the unlawful interference of third parties, including public officers acting outside the scope of their authority.

(b) Such right is only one phase of the right of every person to conduct a legitimate business,—pursue a legitimate calling,—and in the conduct thereof to seek to sell the products or services of that business, free from unjustifiable interference, restraint, or coercion by others. The law has sedulously protected that right for centuries.[2]

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[1] If such contention were sustained, the courts would, of course, be powerless in the face of a "determination" that the prevailing minimum wages in the iron and steel industry are $10 an hour in a "locality" comprising the entire United States.

[2] Restatement of Torts (1939), § 766.

The Government has been a customer for many years of all respondents save one, and, at the date of institution of suit, was not only a party to contracts with several, but an immediate and active prospective customer of all.[3] Petitioners (who, like all public officers acting beyond their lawful authority, were acting as individuals[4] and, therefore, as third parties *vis-a-vis* respondents and the Government) threatened without justification to destroy respondents' right to negotiate contracts with that customer subject only to conditions imposed or authorized *by it* (i.e. by Congress whose province it is to authorize or impose such conditions).

Accordingly, under the repeated decisions of this and other courts protecting the right to negotiate and deal with customers or prospective customers for goods or services against unlawful or otherwise unjustifiable interference of third parties (including public officers acting beyond their authority),[5] the court below was plainly cor-

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[3] See pp. 19-21, *supra*.

[4] *Osborn* v. *The Bank of United States*, 9 Wheat. 738, 833; *Filor* v. *United States*, 9 Wall. 45, 48-49; *United States* v. *Lee*, 106 U. S. 196, 210; *Poindexter* v. *Greenhow*, 114 U. S. 270, 288; *Ex parte Young*, 209 U. S. 123, 159-160; *Goltra* v. *Weeks*, 271 U. S. 536, 544; *Ex parte La Prade*, 289 U. S. 444. See also the cases collected in Point III.

[5] Among the numerous cases which might be cited are *Pierce* v. *Society of Sisters*, 268 U. S. 510; *Truax* v. *Raich*, 239 U. S. 33; *Terrace* v. *Thompson*, 263 U. S. 197; *Scully* v. *Bird*, 209 U. S. 481, cited with approval in *Tennessee Power Co.* v. *T. V. A.*, 306 U. S. 118, 137-138; *Pratt Food Co.* v. *Bird*, 148 Mich. 631, 112 N. W. 701; *State* v. *District Court*, 17 N. D. 285, 115 N. W. 675; *Crescent Mfg. Co.* v. *Mickle*, 216 Fed. 246 (D. C. Ore.); *Roe* v. *Lundstrom*, 89 Utah 520, 57 Pac. (2d) 1128; *Emack* v. *Kane*, 34 Fed. 46 (Cir. Ct., N. D. Ill.); *Price-*

rect in holding that respondents are entitled to the relief sought. Many of such decisions were rendered in the face of the precise objection advanced by petitioners herein, namely, that the sellers had no judicially cognizable right because they could not have compelled their prospective customers to deal or contract with them.[6]

(c) The right asserted is recognized and affirmed by the Public Contracts Act itself by which Congress has imposed certain conditions on the exercise of the right to bid for and negotiate contracts with the Government. In so doing, Congress has necessarily excluded the imposition of other conditions, within the field occupied by the statute, upon the exercise of that right. No one can read the statute, or examine its legislative history,[7] without reaching the self-evident conclusion that Congress intended that

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*Hollister Co.* v. *Warford Corporation*, 18 Fed. (2d) 129 (D. C., N. D. Okla.); *American Mercury Co., Inc.* v. *Chase*, 13 Fed. (2d) 224 (D. C., Mass.); *Graham* v. *Street Railroad Co.*, 47 La. Ann. 1656, 18 So. 707; *Sparks* v. *McCreary*, 156 Ala. 382, 47 So. 332; *Loewe* v. *Lawlor*, 208 U. S. 274; *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418; *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229; *Duplex Co.* v. *Deering*, 254 U. S. 443; and *Truax* v. *Corrigan*, 257 U. S. 312. Such criticism as has been directed at the decisions in the five cases last cited (and similar decisions involving labor boycotts, etc.) has not been on the ground that the plaintiffs therein did not have any legal rights worthy of protection, but has been based on the theory that the conduct of the defendants therein was justifiable or privileged because of their self-interest. It is elementary that public officers may justify their action only by authority of law. See Note 2, p. 40, *infra*.

[6] See particularly *Truax* v. *Raich*, 239 U. S. 33, 38; *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535-536; and Mr. Justice Holmes, dissenting in *May* v. *Woods*, 172 Mass. 11, 14.

[7] See pp. 25-27, *supra*.

every person who should comply with the conditions laid down by it therein[8] should have the right to bid on Government contracts free from inconsistent conditions imposed by others.

The court below, in so holding (R. 399-400), not only gave effect to the plain intent of Congress, but followed the principles long established by the decisions of this Court.[9]

(d) The right asserted is recognized, and rendered more valuable than the corresponding right to seek the patronage of prospective private customers free of unjustifiable interference by third parties, by Section 3709, R. S.[10]

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[8] And, of course, in any other pertinent statutes not here in question.

[9] *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 111; *Gegiow* v. *Uhl*, 239 U. S. 3, 9: "The statute by enumerating the conditions upon which the allowance to land may be denied, prohibits the denial in other cases"; *Waite* v. *Macy*, 246 U. S. 606, 609.

[10] "Except as otherwise provided by law all purchases and contracts for supplies or services in any of the departments of the Government and purchases of Indian supplies, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals." [41 U. S. C. § 5]

which, with exceptions not here material, requires[11] competitive bidding, after public advertisement, on Government supply contracts, and the award of such contracts to the lowest responsible bidders.[12]

Indeed, we believe that Section 3709 itself constitutes a third source of the right asserted by respondents.[13] The Court below, however, did not deem it necessary to rest its decision on that additional ground.

Consequently, even if petitioners were correct in their contention (Pet., p. 11) that Section 3709 confers no legal rights upon bidders for Government contracts, that would disclose no infirmity in the decision below. It is to be noted, however, that the cases relied on by petitioners to establish that proposition do not support it.[14]

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[11] See *Snyder* v. *United States*, 19 Ct. Cl. 547; *Scott* v. *United States*, 44 Ct. Cl. 524; 19 Op. Att. Gen. 685; 28 Op. Att. Gen. 384; 38 Op. Att. Gen. 555, 557.

[12] The requirements thus imposed by Congress, for the purpose of enabling the Government to purchase its supplies at the lowest price, would be meaningless, unless predicated on the assumption that all persons complying with the conditions imposed or authorized by Congress may bid on public contracts free of further conditions unlawfully imposed. See Note 4, page 25, *supra*.

[13] This Court has expressly stated that Section 3709 "necessarily" gives "rights" to bidders, including "the chance for a bargain". *United States* v. *Purcell Envelope Co.*, 249 U. S. 313, 318.

[14] *American Smelting Co.* v. *United States*, 259 U. S. 75, and *O'Brien* v. *Carney*, 6 Fed. Supp. 761 (D. C. Mass.) are discussed in the text. The other cases cited did not involve R. S., § 3709. *United States* v. *New York & Porto Rico S. S. Co.*, 239 U. S. 88, held that a government contractor could

Of the two cases cited which involved Section 3709, the decision of this Court [15] contains a dictum that a government contractor may not disaffirm an executed contract on the ground that it has not been advertised, and the decision of the Massachusetts District Court[16] refused to enjoin the performance of a contract theretofore awarded, and to mandamus its re-award, at the instance of a low bidder who claimed that he was responsible. The latter decision does not stand for the proposition that, in a case not involving the exercise of discretion by a contracting officer as to a bidder's responsibility, or as to the advisability of rejecting all bids, or otherwise, Section 3709 does not confer on a lowest responsible bidder the right to a contract.[17]

But, however that may be, respondents do not assert any

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not defend against a suit for breach of contract on the ground that the contract was not in writing and signed as provided in R. S., § 3744. *Colorado Paving Co.* v. *Murphy*, 78 Fed. 28 (C. C. A. 8th), and *United States Wood Preserving Co.* v. *Sundmaker*, 186 Fed. 678 (C. C. A. 6th), involved, respectively, a city charter and a state statute, differing from § 3709, and held that a bidder, who alleged his responsibility and that his low bid should not have been rejected because his product was inferior or did not conform with contract specifications, could not enjoin the award of a contract to another and compel award to himself.

[15] *American Smelting Co.* v. *United States*, *supra*, Note 14.

[16] *O'Brien* v. *Carney*, *supra*, Note 14.

[17] This question is expressly left open in *Noce* v. *Edward E. Morgan Co.*, 106 Fed. (2) 746 (C. C. A. 8th), by the court which decided *Colorado Paving Co.* v. *Murphy*, *supra*, Note 14. For cases holding that similar state laws confer such right in the circumstances suggested, see *Arensmeyer-Warnock-Zarndt* v. *Wray*, 118 Misc. 619, 194 N. Y. Supp. 398; *State ex rel. Journal Printing Co.* v. *Dreyer*, 183 Mo. App. 463, 167 S. W. 1123; *Berry* v. *City of Tacoma*, 12 Wash. 3, 40 Pac. 414.

such right. Section 3709 certainly confers other rights on bidders or affirms such rights.[18] And whether or not it constitutes an additional source of the right asserted herein is, in any event, immaterial.

(e) Indeed, petitioners concede that respondents have a legal right to do business with the Government upon such terms and conditions as *it* may prescribe. They state (Pet., p. 11): "That no person has a legal right to do business with the Government *except* upon such terms and conditions as the *Government* may prescribe would seem no longer open to argument." They apparently assume, however, that they are the "Government".

But in that assumption they are, of course, mistaken. They represent the Government only to the extent that they act within the scope of their lawful authority. When, as in this case, they exceed their authority, they act only as individuals.[19] Their entire argument collapses as a result of this failure to distinguish between the authority of the Government (respondents' customer), acting through *Congress*, to impose (like any other customer) such conditions as it sees fit upon doing business with it,[20] and the lack of authority of petitioners, third parties, to impose additional conditions not authorized by law, which interfere with petitioners in their efforts to do business with their customer.

(f) Petitioners' contention (Pet., p. 11-12) that respondents are without standing to sue because they complain only of "governmental action which merely increases or sharpens competition" is also untenable. Respondents do

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[18] *United States* v. *Purcell Envelope Co.*, 249 U. S. 313, 318, *supra*, Note 13.

[19] See Note 4, *supra*, p. 32, and cases collected in Point III.

[20] *Ellis* v. *United States*, 206 U. S. 246; *Heim* v. *McCall*, 239 U. S. 175.

not complain of governmental action which *merely* increases or sharpens competition. They complain of unlawful individual action, taken under pretense of authority, which invades their legal rights; and show impairment of competitive position as an element of irreparable damage.

(g) Both the majority and the minority of the court below rejected petitioners' contention,—now advanced with some diffidence (Pet., p. 12),—that their action, taken and threatened, is not subject to judicial review. This contention is based on the theory that the Determination was not an order commanding respondents to act, or subjecting them to any liability, or withholding any license. Whether or not that is true is immaterial.

The Determination itself purported finally to bind respondents; and, under the provisions of the Act and the regulations directing other administrative officials to act in accordance with the Determination, its immediate legal effect, in the absence of judicial restraint, would have been finally to bind respondents and unlawfully to abridge their right to bid on Government contracts immediately to be let.[21] Moreover, the Secretary's regulations and the other acts and threats of petitioners referred to in the Statement (pp. 18-19) all constituted further steps in the enforcement of the Determination against respondents, illegally invading or threatening to invade such right to their immediate and irreparable injury.

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[21] The determination was not, therefore, a mere "stage in an incomplete process of administrative adjudication", having "no immediate legal effect" and "abridging" no right, as in *United States* v. *Los Angeles & Salt Lake R. Co.*, 273 U. S. 299, relied on by petitioners, and distinguished on these grounds in *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 129-131, 143. See also cases cited in Notes 23 and 24, *infra*.

Mere reference to these considerations demonstrates the correctness of the ruling below. The decisions of this Court firmly establish that, in the absence of specific statutory provision to the contrary,[22] a person whose rights have been invaded or are threatened with invasion by the action of administrative officers beyond their statutory authority (even with respect to matters which Congress may commit to exclusive executive determination [23]) is entitled to judicial review of such action by bill in equity.[24]

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[22] Section 5 of the Act seems expressly to contemplate judicial review of wage determinations, whether viewed as "findings" or "decisions",—particularly in view of the fact that the author of the Act stated that the Secretary was authorized to make a wage determination only after hearing. 80 Cong. Rec. 10002, 10023.

[23] *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 110; *Gegiow* v. *Uhl*, 239 U. S. 3, 9; *Waite* v. *Macy*, 246 U. S. 606, 608-609; *Work* v. *Louisiana*, 269 U. S. 250, 253-254, 260; see Brandeis, J., dissenting in *Crowell* v. *Benson*, 285 U. S. 22, 89-91; *Lloyd Sabaudo Societa* v. *Elting*, 287 U. S. 329, 335.

[24] *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 621-622; *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 182-183; *Utah Fuel Co.* v. *Coal Commission*, 306 U. S. 56, 59-60.

## III

### The Decision of the Court Below That the Suit Is Not One Against the United States Is Not Open to Question.

The decision below in no way conflicts with the rule that the United States may not be sued, without its consent, either directly or in an action nominally against a public officer, but in which the decree sought would have the effect of one entered in a suit brought directly against it.

The principle has long been established[1] that a suit against a public officer is not one against the sovereign, where, as here, the gravamen is invasion or threatened invasion of the legal rights of the complainant by affirmative action in excess of the officer's authority and the real object is an injunction restraining or undoing such action.

The reason is clear. The acts of public officials must be justified by authority conferred by law.[2] When, therefore, an official takes or threatens affirmative action in excess of

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[1] *Osborn* v. *The Bank of United States*, 9 Wheat. 738; *Davis* v. *Gray*, 83 U. S. 203; *Pennoyer* v. *McConnaughy*, 140 U. S. 1; In re *Tyler*, 149 U. S. 164; *Scranton* v. *Wheeler*, 179 U. S. 141; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; *Ex parte Young*, 209 U. S. 123; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605; *Waite* v. *Macy*, 246 U. S. 606; *Colorado* v. *Toll*, 268 U. S. 228; *Ickes* v. *Fox*, 300 U. S. 82.

[2] "The acts of all of its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief." *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 108. "A defendant sued as a wrong-doer, who seeks to substitute the state in his place, or to justify by the authority of the state, or to defend on the ground that the state has adopted his act and exonerated him, cannot rest on the bare assertion of his defense. * * * It is necessary, therefore, for such a defendant, in order to complete his de-

his authority which invades or will invade the legal right of another, his act is personal in nature and derives no official justification from being done in asserted agency for the United States.[3] Consequently, a decree in a suit brought to defend against such invasion, actual or threatened, and which merely enjoins, or compels the official to undo, such personal action, does not affect the United States.

Many, if not most, of the occasions for the application of these principles have arisen in cases involving action by public officials who asserted that they were carrying on the "ordinary" or "vital" functions of government in fields not generally considered to be "regulatory" in character (Pet., p. 13). Illustrative of suits held not to be against the United States (or a State) are suits to enjoin the Secretary of the Interior from requiring a land claimant to comply with an allegedly unauthorized condition prior to consideration of a claim to public lands;[4] to dispossess military officers occupying, for army purposes and under claim of title in the United States, property alleged to belong to the plaintiff;[5] to prevent the allegedly unauthorized fixing by a Federal officer of charges of railroads in the possession and control of, and whose revenues belonged to, the United States under the war power;[6] to

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fense, to produce a law of the state which constitutes his commission as its agent, and a warrant for his act." *Poindexter* v. *Greenhow*, 114 U. S. 270, 288. See *Marbury* v. *Madison*, 1 Cranch 137, 170.

[3] *Goltra* v. *Weeks*, 271 U. S. 536, 544.

[4] *Work* v. *Louisiana*, 269 U. S. 250. See also *Santa Fe Pac. R. Co.* v. *Lane*, 244 U. S. 492.

[5] *United States* v. *Lee*, 106 U. S. 196. See also *Tindal* v. *Wesley*, 167 U. S. 204.

[6] *No. Pac. Ry. Co.* v. *North Dakota*, 250 U. S. 135. See also *Dakota Cent. Telephone Co.* v. *South Dakota*, 250 U. S. 163.

enjoin repossession of boats in alleged violation of a lease thereof by the United States;[7] and to enjoin a levy upon property or to restore property taken, to satisfy a state tax in alleged impairment of contract.[8]

Petitioners cite *Louisiana* v. *McAdoo*, 234 U. S. 627, and *Goldberg* v. *Daniels*, 231 U. S. 218, but these cases do not conflict with the principle or decisions upon which respondents rely. In neither case was the complainant seeking to restrain or undo affirmative action taken by the defendant in excess of his authority which invaded or threatened to invade the complainant's legal rights. On the contrary, complainant sought in each case to compel the defendant to exercise his official discretion, and, in the case last cited, sought in the process to obtain property owned by and in the possession of the United States.

*Wells* v. *Roper*, 246 U. S. 335; *Transcontinental & Western Air, Inc.* v. *Farley*, 71 Fed. (2d) 288, and *Johnstown Coal & Coke Co.* v. *Wilson*, 60 Fed. (2d) 557, also relied on by petitioners, involved attempts to restrain or control the acts of administrative officials within the scope of their authority.[9]

Petitioners contend, however, on the authority of these cases, that a suit for an injunction which would have the effect of specifically enforcing a contract of the United States is a suit against the United States, and that consequently the instant suit is likewise one against the United States. But this is a complete nonsequitur. Respondents are not seeking to compel the United States to do anything,

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[7] *Goltra* v. *Weeks*, 271 U. S. 536.

[8] *Allen* v. *B. & O. R. Co.*, 114 U. S. 311. See also *Poindexter* v. *Greenhow*, 114 U. S. 270.

[9] See opinion below, R. 396, Notes 61 and 64.

directly or indirectly. They are merely trying to prevent individuals from taking, under color of office, action which Congress has not authorized, and which, indeed, is contrary to the statutes of the United States.

The petitioners virtually repeat this argument in their broad contention (Pet., pp. 13-14) that the relief sought by respondents constitutes interference with the contracting and purchasing activities of the United States. This argument stands on the same legal footing as that last rejected. And from a practical standpoint it is repudiated by the recorded experience (pp. 4-5, *supra*) of government contracting agencies since the granting of the temporary relief sought in the complaint.

Respectfully submitted,

WILLIAM CLARKE MASON,
O. MAX GARDNER,
FREDERICK H. KNIGHT,
HAROLD F. MCGUIRE,
ROBERTS B. THOMAS,
*Counsel for Respondents.*

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